

No. 4414

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United States

1421  
**Circuit Court of Appeals**

**For the Ninth Circuit.**

FREDERICK V. LINEKER and FREDERICK V. LINEKER as  
Administrator of the Estate of NORVENA LINEKER,  
Deceased,

Appellant,

vs.

R. S. MARSHALL, OLIVE H. MARSHALL, MARY J. DILLON  
(Formerly MARY J. TYNAN), ADELAIDE McCOLGAN, as  
Administratrix With the Will Annexed of the Estate of  
DANIEL A. McCOLGAN, Deceased, (Substituted in Place  
and Stead of said DANIEL A. McCOLGAN, Deceased),  
R. McCOLGAN, EUSTACE CULLINAN, E. C. PECK,  
T. K. BEARD, GRACE A. BEARD, UNION SAVINGS  
BANK OF MODESTO and STANISLAUS LAND AND  
ABSTRACT COMPANY,

Appellees.


**Transcript of Record.**

Upon Appeal from the Southern Division of the  
United States District Court for the  
Northern District of California,  
Second Division.

FILED

DEC 15 1924

R. D. MORGENTHAU,  
Clerk



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# INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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In the District Court of the United States in and for the Northern District of California, Southern Division.

No. 16,170.

FREDERICK V. LINEKER and NORVENA  
LINEKER,

Plaintiffs,

vs.

R. S. MARSHALL, OLIVE H. MARSHALL,  
MARY J. DILLON (Formerly Mary J.  
Tynan), DANIEL M. McCOLGAN, R. Mc-  
COLGAN, EUSTACE CULLINAN, E. C.  
PECK, T. K. BEARD, GRACE A.  
BEARD, UNION SAVINGS BANK OF  
MODESTO, and STANISLAUS LAND  
AND ABSTRACT COMPANY,

Defendants.

ANSWER TO AMENDED BILL OF COM-  
PLAINT.

Now come the defendants, R. S. Marshall, Olive H. Marshall, E. C. Peck, T. K. Beard, Grace A. Beard, Union Savings Bank of Modesto and Stanislaus Land and Abstract Company, and making answer unto the Amended Bill of Complaint in the above-entitled cause, admit, deny and allege as follows, to wit:

I.

Making answer unto the allegations contained in paragraph I of said Amended Bill of Complaint,



these defendants allege that neither they nor either nor any of them have any information or belief sufficient to enable them or either or any of them to make answer unto the allegations contained in said paragraph I, and basing their denial upon that ground deny that the plaintiffs, Frederick V. Lineker and Norvena Lineker, his wife, are or either of them is a citizen of the Dominion of Canada, subjects of [1\*] George IV, King of England, or aliens.

II.

Admit the allegations contained in paragraph II of said Amended Bill of Complaint.

III.

Admit the allegations contained in paragraph III of said Amended Bill of Complaint.

IV.

Making answer unto the allegations contained in paragraph IV of said Amended Bill of Complaint, these defendants admit that on or about the 19th day of November, 1907, Norvena Lineker (formerly Norvena Svensen) became the owner of the real property described in said paragraph IV, but deny that on the 2d day of September, 1914, or at all or any time since said date, said real property has been of the value of Sixty Thousand Dollars (\$60,000), or any value above the sum of \$20,000, and deny said real property is now or at the time of filing of said Amended Bill of Complaint was of the value of \$75,000, or any sum in excess of the sum of \$30,000.

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\*Page-number appearing at foot of page of original certified Transcript of Record.

## V.

Admit the allegations contained in paragraph V of said Amended Bill of Complaint.

## VI.

Making answer unto the allegations contained in paragraph VI of said Amended Bill of Complaint, these defendants admit that on or about the 18th day of August, 1913, the plaintiff, Norvena Lineker made an instrument in the form of a deed of said property to her husband, Frederick V. Lineker, but allege that neither of these defendants nor either nor any of them have any information or belief sufficient to enable them or either or any of them to make answer unto the remaining allegations in paragraph VI, and basing their denial upon that ground deny that the said Norvena Lineker made said deed to Frederick V. Lineker, so that he, the said Frederick V. Lineker might be in a better [2] position to assist her in protecting her interest in said real property, and upon the same ground deny that there was no consideration given or received for the making of said instrment; and upon the same ground deny that neither of said plaintiffs have at any time made any transfer of their interest or ownership of said property, or any part thereof, except as set forth in said Amended Bill of Complaint.

## VII.

Making answer unto the allegations contained in paragraph VII of said Amended Bill of Complaint, these defendants admit so much thereof as is contained in lines 9 to 26 of page 3 of said Amended

Bill of Complaint, inclusive, but as to the remaining allegations of said paragraph VII these defendants allege that neither they nor either nor any of them have any information or belief sufficient to enable them or either or any of them to make answer thereunto, and basing their denial upon that ground, deny the said R. McColgan did not in fact lend to said Norvena Lineker, the full sum of \$2,850.00 mentioned in the note dated June 28th, 1910, but only the sum of \$2,500.00.

VIII.

Admit the allegations contained in paragraph VIII of said Amended Bill of Complaint.

IX.

Making answer unto the allegations contained in paragraph IX of said Amended Bill of Complaint, these defendants allege that they have no information or belief sufficient to enable them or either of them to make answer thereto, and basing their denial on that ground deny generally and specifically each and all the allegations contained in the said paragraph IX.

Further making answer unto the allegations contained in said paragraph IX of said Amended Bill of Complaint, these defendants allege that if the allegations contained in said paragraph [3] IX are true, that neither these defendants nor either nor any of them ever knew or heard of said facts until long after the transactions mentioned in said Amended Bill of Complaint.

X.

Making answer unto the allegations contained in

paragraph X of said Amended Bill of Complaint, these defendants allege that neither they nor either nor any of them have any information or belief sufficient to enable them, nor either nor any of them, to make answer unto the allegations contained in paragraph X of said Amended Bill of Complaint, and basing their denial upon the ground deny generally and specifically each and all the allegations of said paragraph X.

Further answering unto the allegations contained in said paragraph X of said Amended Bill of Complaint, these defendants allege that if the same are true, that these defendants had no notice or knowledge of the same until after the transactions therein mentioned.

## XI.

Making answer unto the allegations contained in paragraph XI of said Amended Bill of Complaint, these defendants admit that the plaintiffs consented that the property be bought by the said R. S. Marshall, as trustee for the said plaintiff Frederick V. Lineker under an agreement hereinafter mentioned, and admit that on the 2d day of August, 1914, the said real property was sold by R. McColgan, as trustee under the deed of trust mentioned in said Amended Bill of Complaint, to the defendant, R. S. Marshall, as agent and trustee for the plaintiff Frederick V. Lineker, for the sum of \$14,000, but deny that in consenting to said sale, the said plaintiffs, or either of them relied upon the counsel of the defendants, Daniel A. McColgan and R. McColgan, or either of them, [4] but on the contrary

alleges that at the time of the said sale, said plaintiffs were represented by counsel learned in the law and of their own choosing.

### XII.

These defendants admit the allegations contained in paragraph XII of the said Amended Bill of Complaint, and in that behalf allege that the said deed of trust was executed by the said defendants R. S. Marshall and his wife, Olive H. Marshall, to M. J. Connors and B. M. Lyons, Trustees for Annie Connors, and that the said defendants R. S. Marshall and his wife, Olive H. Marshall, received from said Annie Connors the sum of \$13,000, which amount was thereupon turned over to the said R. McColgan upon the explicit direction of the said plaintiffs and their said counsel learned in the law.

### XIII.

Making answer unto the allegations contained in paragraph XIII of said Amended Bill of Complaint, these defendants admit that on the 3d day of September, 1914, plaintiff, Frederick V. Lineker and defendant, R. S. Marshall, entered into the agreement in writing set out in full in said paragraph XIII, and admit that on said 2d day of September, 1914, the said defendant, R. S. Marshall and his wife, the said Olive H. Marshall, made a certain deed of trust to the defendants, R. McColgan and Eustace Cullinan as trustees for the defendant, Daniel A. McColgan, for the sum of \$2,445.00, but deny that the same was without any real consideration, and deny that the same was wrongfully or unlawfully done; deny that the same

was in fraud of the plaintiffs' rights herein, but on the other hand allege in this behalf that said deed of trust was executed by the said R. S. Marshall and his wife to the said R. McColgan and Eustace Cullinan upon the explicit direction of the said plaintiffs and their said counsel learned in the law.  
[5]

#### XIV.

Admit the allegations contained in paragraph XIV of said Amended Bill of Complaint.

#### XV.

Admit the allegations contained in paragraph XV of said Amended Bill of Complaint.

#### XVI.

Making answer unto the allegations contained in paragraph XVI of said Amended Bill of Complaint, these defendants deny the deed of trust made by defendant, R. S. Marshall and his wife, Olive H. Marshall, to R. McColgan and Eustace Cullinan as trustees for defendant, Daniel A. McColgan, was made without any consideration therefor, and deny that the same was made for the purpose of obtaining for defendants Daniel A. McColgan and R. McColgan, or either of them, an unconscionable and illegal or unconscionable or illegal advantage of plaintiffs; deny that the same was made for the purpose of wrongfully or otherwise obtaining more than was due from plaintiffs to the defendant, Daniel A. McColgan.

#### XVII.

Making answer unto the allegations contained in paragraph XVII of said Amended Bill of Com-

plaint, these defendants deny that each and all, or each or all, or any of the transfers or attempted transfers of said property, or all or any of the dealings therewith by any of the defendants subsequent to the said 24th day of September, 1914, were made without any consideration passing to the plaintiffs, or either of them; deny that the same were and are, or were or are, illegal.

### XVIII.

Making answer unto the allegations contained in paragraph [6] XVIII of said Amended Bill of Complaint, these defendants deny that prior to the commencement of this action and on or about the 3d day of June, 1918, plaintiff, Frederick V. Lineker, revoked and rescinded, or revoked or rescinded, all or any right of the said defendant, R. S. Marshall, to act for the said Frederick V. Lineker as his agent, or otherwise, under the agreement between them dated September 2, 1914, except that on or about the 3d day of June, 1918, plaintiff, Frederick V. Lineker, was and for a long time had been in default under said agreement, and that he did serve a certain notice upon the said defendant, R. S. Marshall, as more fully hereinafter set forth.

### XIX.

Making answer unto the allegations contained in paragraph XIX of said Amended Bill of Complaint, these defendants allege that neither they nor either nor any of them have any information or belief sufficient to enable them or either of them to make answer to the allegation that the sum of \$13,000 received by Daniel A. McColgan on the 2d

day of September, 1914, was greatly or at all in excess of all moneys due or owing to him from the plaintiffs, or either of them, and basing their denial upon that ground, deny that the said sum received by the said Daniel A. McColgan was greatly or at all in excess of the moneys due or owing to him from the plaintiffs, and upon the same ground defendants deny that the deed of trust made by defendants, R. S. Marshall and Olive H. Marshall, to R. McColgan and Eustace Cullinan as trustees for Daniel A. McColgan was without consideration or void as against these plaintiffs.

#### XX.

Further making answer unto the remaining allegations of said paragraph XIX of said Amended Bill of Complaint, these defendants deny that all or any of the attempted conveyances [7] under said last-named deed of trust were or are void or illegal or made without any consideration moving to these plaintiffs, or either of them, and deny that any or all of the conveyances made or attempted to be made by the said R. McColgan and Eustace Cullinan as trustees for Daniel A. McColgan under said deed of trust dated September 2, 1914, are void and of no virtue as against these plaintiffs, or either of them, and deny that the conveyance set out in said Amended Bill of Complaint by R. McColgan and Eustace Cullinan to E. C. Peck is void and deny that said conveyance is of no virtue against these plaintiffs, or either of them, and deny that the conveyance of said property by said E. C. Peck to the defendant, T. K. Beard, is void and of no effect



or unlawful as against these plaintiffs, or either of them; and deny that the conveyance of said property by T. K. Beard and Grace A. Beard to R. S. Marshall is unlawful or void, or of no effect as against these plaintiffs or any of them.

XXI.

Making answer unto the allegations contained in paragraph XX of said Amended Bill of Complaint, these defendants allege that neither they nor either nor any of them have any information or belief sufficient to enable them or any of them to make answer to the allegations contained in said paragraph XX, and basing their denial upon that ground deny generally and specifically each and all the allegations of said paragraph XX contained.

SECOND.

And for a further and separate defense to said action, these defendants allege that said action is barred by the laches of said plaintiffs.

THIRD.

For a further and separate defense to said action, these defendants allege that said action is barred by the provisions [8] of subdivision 4 of Section 338 of the Code of Civil Procedure of the State of California.

FOURTH.

For a further and separate defense to said action, these defendants allege that said action is barred by the provisions of Section 318 of the Code of Civil Procedure of the State of California.

FIFTH.

For a further and separate defense to said action,

these defendants allege that said action is barred by the provisions of subdivision 1 of Section 337 of the Code of Civil Procedure of the State of California.

#### SIXTH.

For a further and separate defense to said action, these defendants allege that said action is barred by the provisions of Section 343 of the Code of Civil Procedure of the State of California.

#### SEVENTH.

For a further and separate defense to said action, these defendants allege:

##### I.

That heretofore, and on, to wit, the — day of —, said plaintiffs commenced a certain action at law in the above-entitled court against the said defendant, Mary J. Dillon, formerly Mary J. Tynan, wherein the said plaintiffs alleged that by the acts of said Mary J. Dillon that the said plaintiffs had lost the land described in the amended complaint herein and prayed for judgment against the said Mary J. Dillon for the damages suffered by them, namely, the value of the land so lost;

##### II.

That such proceedings were had in the matter of said [9] action at law that subsequently and on the 3d day of October, 1919, the said plaintiffs obtained a judgment against the said Mary J. Dillon for the sum of \$32,131.75, upon the allegations and theory of the said plaintiffs that the said plaintiffs had lost the land described in the amended complaint herein through the actions of the said Mary J. Dillon.

III.

That subsequently the above-entitled court made and entered its order reducing the amount of said judgment to the sum of \$28,000, and that these defendants are informed and believe that the said plaintiffs have collected said amount, or at least the major portion thereof and have, therefore, been fully paid for said land.

EIGHT.

Further making answer unto the said amended complaint, these defendants allege:

I.

That from the 19th day of November, 1907, down to the 18th day of August, 1913, one Norvena E. S. Lineker (formerly Norvena E. Svensen) was the owner of that certain real property situated in the County of Stanislaus, State of California, and more particularly described as follows, to wit:

All that certain portion of the Northwest quarter of section Six (6) in Township Four (4) South, Range Nine (9) East, Mount Diablo Base and Meridian, lying North and West of the Paradise Road.

II.

That said real property was on the 6th day of August, 1915, and had been for some time prior thereto, subject to a life interest therein, in favor of one Ole Svensen; that said Ole Svensen died on the 6th day of August, 1915;

III.

That on the 22d day of September, 1912, Norvena E. [10] Svensen and Frederick V. Lineker, plain-

tiffs herein, intermarried, and ever since the said 22d day of September, 1912, they have been and now are husband and wife.

#### IV.

That on the 18th day of August, 1913, said Norvena E. S. Lineker conveyed said real property by gift deed to Frederick V. Lineker, and said conveyance was recorded in the office of the County Recorder in said Stanislaus County, on July 27, 1914, in the Volume 193 of Deeds, at page 590 thereof, records of said County of Stanislaus; that on or about the 20th day of June, 1910, and while she was the owner of said real property, the said Norvena E. S. Lineker executed and delivered to defendant, Daniel A. McColgan, a deed of trust wherein and whereby the said Norvena E. S. Lineker conveyed and granted the said real property to said R. McColgan as trustee, to secure the payment by the said Norvena E. S. Lineker of a certain promissory note, executed by said Norvena E. S. Lineker to the defendant, Daniel A. McColgan, as payee thereof, for the sum of Twenty-eight Hundred Fifty Dollars (\$2850.00), and to secure the payment also of other sums that should or might be loaned by said Daniel A. McColgan to Norvena E. Lineker, and evidenced by the promissory note or notes of Norvena E. Lineker and said deed of trust was recorded in the office of the County Recorder of the County of Stanislaus, State of California, on the 22d day of April, 1911, in Volume 146 of Deeds, at page 378; and that at the time when the said Norvena E. S. Lineker conveyed the

said real property to the said plaintiff by deed of gift, as aforesaid, the said real property was subject to the said deed of trust.

## V.

That on the 11th day of June, 1913, in an action then pending in the Superior Court of the State of California, in and [11] for the County of Alameda, one J. A. Williams, plaintiff therein, recovered a judgment against said Norvena E. Svensen, who afterwards became Norvena E. S. Lineker when she married Frederick V. Lineker, as aforesaid, which judgment was for the sum of \$1,285.00, together with \$15.00 costs; that in said action a writ of execution was issued to the sheriff of the County of Stanislaus on the 29th day of July, 1913, directing said sheriff of the county of Stanislaus to satisfy said judgment out of the property of said Norvena E. Svensen; that thereafter, and in pursuance of said writ of execution, A. S. Dingley, as the sheriff of said county of Stanislaus, did, on the 7th day of August, 1913, levy upon the real property, being the same property described herein, and in said deed of trust, and after giving notice as required by law, said sheriff of the county of Stanislaus sold said real property to one William C. Crittendon, who was the highest bidder thereat, for the sum of Thirteen Hundred Sixty-one and 20/100 (\$1361.20) Dollars, and said sheriff of said county of Stanislaus on said 30th day of August, 1913, issued to said William C. Crittendon his certificate of said sale, in accordance with the law, and a duplicate of said

certificate was duly filed by said sheriff of said county of Stanislaus in the office of the county recorder of the county of Stanislaus, and there recorded on the 3d day of September 1913, in Volume 3 of Certificates of Sale, at page 81 thereof; that thereafter, and on the 15th day of July, 1914, said Daniel A. McColgan purchased and acquired from said William C. Crittendon all the right, title and interest of said William C. Crittendon in and to said real property, and in and to said certificate of sale, and said William C. Crittendon on the 15th day of July, 1914, executed to said Daniel A. McColgan an instrument in writing whereby said [12] William C. Crittendon granted, sold and assigned to said Daniel A. McColgan the said certificate of sale, and all the right, title and interest of said William C. Crittendon in and to said certificate of sale, and in and to said real property therein described; that said instrument in writing so executed by William C. Crittendon, to said defendant, Daniel A. McColgan, was recorded in the office of the county recorder of said county of Stanislaus at seventeen minutes past one o'clock P. M., on the 2d day of September, 1914, in Volume 3 of Miscellaneous, at page 343 thereof; that thereafter and on said 2d day of September, 1914, the said W. S. Dingley, as sheriff of said county of Stanislaus, executed to said Daniel A. McColgan, in accordance with the law, his deed reciting the facts of the issuance of said writ of execution, the sale thereunder, the issuance of his certificate of sale to said William C. Critten-

don as aforesaid, the assignment by said William C. Crittendon to said Daniel A. McColgan, as aforesaid, and granting, in accordance with the law, and in pursuance of the statute in such cases made and provided, to said Daniel A. McColgan all the right, title and interest and claim which the said judgment debtor, Norvena E. Svensen, had, at the time of the levy of said writ of execution, as aforesaid, or on the said 2d day of September, 1914, had in or to said land; and said deed from said sheriff to said Daniel A. McColgan was recorded in the office of the county recorder of said county of Stanislaus at thirteen minutes past two o'clock P. M. on the 2d day of September, 1914, in Volume 207 of Deeds at page 143 thereof.

## VI.

That on or about the 23d day of April, 1914, said R. McColgan, as the trustee named in said deed of trust, gave [13] notice, and caused notice to be given, in accordance with the terms of said deed of trust, that he would on May 25, 1914, sell at public auction, at a time and place set forth in said notice, the property described in said deed of trust, being the same property herein described, and that said sale was thereafter postponed from time to time, as provided in said deed of trust, and at the request of plaintiffs, from the 25th day of May, 1914, to the 2d day of September, 1914, and on said 2d day of September, 1914, at 3 o'clock P. M., on said day, said real property was sold by R. McColgan, as the trustee named in said deed of trust, under and in accordance with the provi-

sions of said deed of trust, and at said sale, the said real property was sold by said R. McColgan, as such trustee, to R. S. Marshall, defendant herein.

## VII.

That on and prior to the 2d day of September, 1914, the said real property was subject to certain liens and encumbrances as follows, to wit:

An attachment levied May 21, 1912, in an action then pending in the Superior Court of the State of California, in and for the county of Sanislaus, entitled "Farmers and Merchants Bank, a corporation, vs. Norvena E. Svensen and Mary J. Tynan," which attachment was for \$1,047.75, with interest at the rate of eight (8%) per cent, from the 14th day of July, 1911, interest to be compounded semi-annually.

Attachment levied in an action by First National Bank of Modesto, a corporation, plaintiff, vs. Norvena E. Lineker and Fred V. Lineker, defendants, which attachment was for \$193.34.

Attachment levied November 6, 1912, in an action then [14] pending the the Superior Court of the State of California, in and for the county of Stanislaus entitled "Mary J. Tynan, Plaintiff, vs. Norvena E. Lineker (Formerly Norvena E. Svensen), Defendant," which attachment was on the 4th day of August, 1914, reduced to judgment in favor of the plaintiff for the sum of One Thousand Two Hundred and Sixty-four and 91/100 Dollars (\$1,264.91), with interest thereon at the rate of seven per cent (7%) per annum.



The claims which were secured by said attachments in favor of said First National Bank of Modesto and said Farmers and Merchants' Bank, a corporation, and by said attachment and judgment in favor of said Mary J. Tynan, respectively, have never been satisfied or discharged.

#### VIII.

That the said plaintiffs did not have sufficient money to enable them, or either of them, to purchase said real property at said sale so to be held under said deed of trust and that neither of said plaintiffs had any credit which would enable them, or either of them, to borrow sufficient money to purchase the said property at said sale; that in order to purchase the said property at said sale under said deed of trust, it was necessary to secure and have the sum of \$14,000.

#### IX.

That the said plaintiffs and their counsel solicited the defendant, R. S. Marshall, to purchase the said property at said trustee's sale, and the said R. S. Marshall then and thereupon agreed to purchase the said property and to borrow from one Annie Connors the sum of \$13,000, and the said defendant, R. S. Marshall, then and thereupon agreed to purchase the said property and to execute his promissory note, together with a deed of trust, for sufficient money to purchase the same. [15]

#### X.

That at the same time, the said plaintiff, Frederick V. Lineker and defendant, R. S. Marshall,

entered into a certain agreement in writing, in the words and figures following, to wit:

“THIS MEMORANDUM OF AGREEMENT, made and entered into this 2d day of September, 1914, between R. S. Marshall of the County of Stanislaus, State of California, the party of the first part, and Fred V. Lineker, of the County of Alameda, State of California, the party of the second part, WITNESSETH:

“WHEREAS, R. S. Marshall has this day purchased for said Fred. V. Lineker that portion of the northwest quarter of section six (6) township four (4) south, range nine (9) east, Mount Diablo, lying north and west of the County Road known as the Paradise Road, and being situate in the County of Stanislaus, State of California, and in accordance with his understanding and agreement has given his promissory notes secured by deeds of trust upon said premises, one for \$13,000.00 to Annie Connors, and one for \$2,455.00 to Daniel A. McColgan, and has become personally liable therefor.

“It is agreed by and between the said parties hereto that said party of the first part shall cause the said premises to be surveyed, and subdivided and sell the same, upon the terms and conditions hereinafter specified, and the proceeds thereof shall be divided as hereinafter specified, the said share going to the party of the first part being for and in consideration of the labor and service performed by him, and the responsibility assumed by him.

“It is further understood that of the \$2,455.00

loan, \$455.00 has been used to pay the first six months interest of the \$13,000.00 loan, and that possibly the said party of the second part may require, for his own use prior to the sale of any of said premises, some money from time to time, and the party of the first part agrees that in case the said party of the second part desires, he will repay to him the said sum of \$455.00, said amount, however, to be paid at the rate of not more than \$75.00 a month.

“The party of the first part, as hereinbefore specified, is immediately to cause the said premises to be surveyed and laid out, and upon the sale of said premises, or any portion thereof, the proceeds are to be applied as follows, to wit:

“Toward the payment of the principal and interest of any of the aforesaid indebtedness, and taxes and assessments imposed upon said premises and any other expenses that by subsequent agreement between the parties may be incurred, and the balance is to be divided equally between the parties hereto.

“It is understood that said land is to be sold at such prices as from time to time may be agreed upon between the parties hereto.

“This agreement is intended to extend to and bind the heirs, executors, administrators and assigns of the parties hereto.

“In case the parties are unable to agree as to the price of sale, said matter shall be submitted to arbitration. [16]

“IN WITNESS WHEREOF, the parties hereto

have hereunto subscribed their names the day and year first above written.

“R. S. MARSHALL.

“FRED V. LINEKER.”

### XI.

That on the 2d day of August, 1914, the said real property was sold by R. McColgan as Trustee under the said deed of trust, to the defendant, R. S. Marshall, for the sum of \$14,000, and the said defendant, R. S. Marshall, and the defendant, Olive H. Marshall, gave their promissory note for \$13,000 to said Annie Connors and executed their deed of trust, conveying said land to M. J. Connors and B. M. Lyons, Trustees for the said Annie Connors, and the said defendants, R. S. Marshall and Olive H. Marshall gave their promissory note to Daniel A. McColgan for the sum of \$2,455.00, and made, executed and delivered to R. McColgan and Eustace Cullinan, their deed of trust to said land as security for said promissory note.

### XII.

And the defendant, R. S. Marshall, paid to Daniel A. McColgan, the sum of \$14,000, the purchase price of said land and paid to Annie Connors, the sum of \$455.00, the interest in advance, and paid the remaining \$1,000 for the use and benefit of the said plaintiff, Frederick V. Lineker.

### XIII.

That the said deed of trust to M. J. Connors and B. M. Lyons, as trustees for said Annie Connors, was executed on the 2d day of September, 1914,

and recorded in the office of the county recorder of the county of Stanislaus on September 3, 1914, in Volume 198 of Trust Deeds, at page 634 thereof; that said deed of trust to R. McColgan and Eustace Cullinan as trustees for Daniel A. McColgan was made, executed and delivered on the 2d day of September, 1914, and recorded on the 3d day of September, 1914, in Liber 210 of Trust Deeds at page 41. [17]

## XIV.

That the said R. S. Marshall, immediately after the purchase of the said property at the said trustee's sale, proceeded to, and did at his own expense, survey and subdivide the said property and do everything on his part to be done or performed under the said agreement between the said R. S. Marshall and Frederick V. Lineker and the said R. S. Marshall expended from his own sums, in improving the said property, about the sum of \$—, and that the said R. S. Marshall attempted to sell and did procure purchasers for various portions of the subdivision of said real estate, and attempted on numerous and many occasions to get the said Frederick V. Lineker to join in deeds therefor; that the said Frederick V. Lineker, at various times promised to sign said deeds and to aid in effecting a sale of said property, but never did and never would sign said deeds, and as a result thereof, said defendant, R. S. Marshall, was unable to sell any portion of said property or to pay the interest upon the promissory notes to said

Annie Connors and to said Daniel A McColgan, or any part of the principal thereof.

#### XV.

That as a result of the actions of the said Frederick V. Lineker, as aforesaid, the said R. McColgan and Eustace Cullinan as such trustees, proceeded to advertise the said property for sale under the terms of the said deed of trust and then and thereupon, the said plaintiff, Frederick V. Lineker, commenced an action in the Superior Court of the State of California, in and for the county of Stanislaus, No. 5344, Records of said Court, against the defendants Daniel A. McColgan, R. McColgan, Eustace Cullinan, R. S. Marshall and Olive H. Marshall, and that such proceedings were had in the matter of said last-named action that Findings of Fact and Conclusions of Law and judgment were made and entered in [18] favor of the defendants and against the plaintiff, Frederick V. Lineker, a true copy of which findings of fact and conclusions of law are hereto attached, marked Exhibit "A" and made a part hereof.

#### XVI.

That said last-named judgment has never been appealed from and that the time to appeal therefrom has expired and said judgment has become final.

#### XVII.

That subsequent to the entry of the judgment in said last-named action, the said R. McColgan and Eustace Cullinan proceeded to, and did sell the said property under the said deed of trust and that

at said sale, the said property was purchased by the defendant, E. C. Peck, and that subsequently the said E. C. Peck sold and conveyed the said property to the defendant, T. K. Beard, and that subsequently, the said T. K. Beard sold and conveyed an undivided one-half interest in and to the said real property to the defendant, R. S. Marshall; that prior to said sale to Peck, said R. S. Marshall had conveyed an undivided one-half interest in said property to said T. K. Beard.

XVIII.

That on the 9th day of February, 1916, after proceedings duly and regularly had in that certain proceeding in the county of Stanislaus, State of California, numbered 4954, upon the petition of defendant, R. S. Marshall, the life estate of the said Ole Svensen, deceased, was terminated by a decree of the Superior Court of the County of Stanislaus, a true copy of which decree terminating life estate is hereto attached, marked Exhibit "B," and hereby specifically made a part hereof.

XIX.

That on the 4th day of March, 1918, T. K. Beard and Grace A. Beard, his wife, and R. S. Marshall and Olive H. Marshall, [19] his wife, made, executed and delivered to Union Savings Bank, a corporation, their promissory note for the sum of \$15,000, and as security therefor, made, executed and delivered to the Stanislaus Land and Abstract Company, a corporation, their deed of trust for the benefit of said Union Savings Bank, upon the real property herein described, and that

the defendants, T. K. Beard and R. S. Marshall are the owners in fee simple of the said real property, subject to said deed of trust to said Stanislaus Land and Abstract Company, trustee for said Union Savings Bank, and are in possession thereof.

WHEREFORE, the defendants herein answering pray that plaintiffs take nothing by this action, but that it be adjudged and decreed that the defendants, R. S. Marshall and T. K. Beard, are the owners of the said property, subject only to the said deed of trust to Stanislaus Land and Abstract Company, trustee for Union Savings Bank.

HAWKINS & HAWKINS,

JOHN S. PARTRIDGE,

Attorneys for Above-named Defendants. [20]

United States of America,

State of California,

Northern District of California,

City and County of San Francisco,—ss.

R. S. Marshall, being first duly sworn, deposes and says:

That he is one of the defendants in the above-entitled action; that he has read the foregoing answer and knows the contents thereof and that the same is true of his own knowledge except as to the matters and things therein stated on information and belief and as to those matters, that he believes it to be true.

R. S. MARSHALL.



Subscribed and sworn to before me this 26th day of March, 1920.

[Seal] J. W. HAWKINS,  
Notary Public in and for the County of Stanislaus,  
State of California.

[Endorsed]: Filed Mar. 31, 1920. Walter B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [21]

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At a stated term, to wit, the November term, A. D. 1921, of the Southern Division of the United States District Court for the Northern District of California, Second Division, held at the courtroom in the city and county of San Francisco, on Monday, the 7th day of November, in the year of our Lord one thousand nine hundred and twenty-one. Present: The Honorable FRANK H. RUDKIN, District Judge for the Eastern District of Washington, designated to hold and holding this court.

(Title of Cause.)

MINUTES OF COURT—NOVEMBER 7, 1921—  
ORDER SUBSTITUTING ADELAIDE Mc-  
COLGAN, ETC., IN PLACE AND STEAD  
OF DANIEL A. McCOLGAN.

The death of the defendant, Daniel A. McColgan, was suggested and upon motion of A. J. Harwood Esq., it is ordered that Adelaide McColgan, as administratrix with the will annexed of the estate of Daniel A. McColgan, deceased, be and she

is hereby substituted in place and stead of said defendant, Daniel A. McColgan, deceased. [22]

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At a stated term, to wit, the July term, A. D. 1922, of the Southern Division of the United States District Court, in and for the Northern District of California, Second Division, held at the courtroom in the city and county of San Francisco, on Thursday, the 19th day of October, in the year of our Lord one thousand nine hundred and twenty-two. Present: The Honorable WILLIAM H. HUNT, Circuit Judge.

(Title of Cause.)

MINUTES OF COURT—OCTOBER 19, 1922—  
ORDER SUBSTITUTING FREDERICK V.  
LINEKER, ETC., IN PLACE AND STEAD  
OF NORVENA LINEKER, DECEASED.

Upon motion of Wm. F. Rose, Esq., attorney for plaintiffs and upon the suggestion of the death of Norvena Lineker one of the plaintiffs herein, it is ordered that Frederick V. Lineker, Administrator of the Estate of Norvena Lineker, Deceased, be and he is hereby substituted as plaintiff in the place and stead of said Norvena Lineker, Deceased. [23]

(Title of Court and Cause.)

No. 506—IN EQUITY.

OPINION.

JOHN L. TAUGHER, Esq., Attorney for Plaintiffs.

WM. ROSE, Esq., Attorney for Plaintiffs.

Messrs. HAWKINS & HAWKINS and Messrs. MASTICK & PARTRIDGE, Attorneys for Defendants R. S. Marshall, Olive H. Marshall, E. C. Peck, T. K. Beard, Grace A. Beard and Mary J. Dillon.

Messrs. CULLINAN & HICKEY, Attorneys for Defendants, D. A. McColgan and Eustace Cullinan.

ALFRED J. HARWOOD, Esq., Attorney for Defendant R. McColgan.

MEMORANDUM—PLEA OF RES JUDICATA SUSTAINED—BILL DISMISSED.

RUDKIN, Circuit Judge.—On account of the press of other business, I will not undertake to state in detail, the issues involved in the protracted litigation between the parties now before the court. A careful examination of the voluminous pleadings, decisions and judgments in the prior litigation, convinces me that the decree in the case of Lineker vs. McColgan, affirmed by the District Court of Appeals, settled for all time the rights of the par-

ties thereto, growing out of their dealings and transactions to the following extent, at least:

First, that under the execution sale and Sheriff's deed, McColgan required the equity of redemption in the lands in controversy, in his own right, and became entitled to receive and retain for his own use and benefit all the proceeds of sale under the trust deed, above the indebtedness secured thereby, to which the plaintiff would otherwise have been entitled.

Second, that at the date of the decree the plaintiff [24] in that action was indebted to McColgan in the sum of \$2,455 the amount of the promissory note executed by Marshall to McColgan.

Third, that the second deed of trust was founded upon an adequate consideration.

Fourth, that the defendant McColgan, was not at that time indebted or accountable to the plaintiff in any sum or sums whatsoever.

I think it plain also, that the questions thus determined were within the issues and properly before the Court. It was suggested on the argument that there has been some relaxation of the rule of *res judicata* in the more recent decisions of the Supreme Court, but so far as I am advised there has been no departure from the rule announced by Mr. Justice Field in *Cromwell vs. County of Sac*, 94 U. S. 351, 352, which may be stated as follows: Where the second action is based upon, the same claim or demand as the first, the judgment in the former action, if rendered upon the merits, constitutes *and* absolute bar to any subsequent action,

concluding the parties and those in privity with them, not only as to every matter which was offered and received to sustain or defeat the claim of demand, but as to any other admissible matter which might have been offered for that purpose. The rule there stated has been reaffirmed as late as *Meyers vs. International Trust Co.*, decided November 12, 1923.

The object of the present suit is to relitigate the questions there determined. This in my opinion cannot be done. With the rights of the parties to the former action irrevocably established to the extent above indicated, the complaint states no independent cause of action.

The plea of *res judicata* is therefore sustained and the bill dismissed.

[Endorsed]: Filed Jany. 24, 1924. Walter B. Maling, Clerk. [25]

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(Title of Court and Cause.)

No. 506—IN EQUITY.

FINAL DECREE.

This cause came on to be heard this term and was argued by counsel, John L. Taugher, Esq., and William F. Rose, Esq., appearing for plaintiffs; Alfred J. Harwood, Esq., appearing for Adelaide McColgan, as Administratrix of the Estate of Daniel A. McColgan, deceased, and for R. McColgan; Eustace Cullinan, Esq., appearing for him-

self; and K. C. Partridge, Esq., and H. M. Wright, Esq., appearing for defendants R. S. Marshall, Olive H. Marshall, Mary J. Dillon, E. C. Peck, T. K. Beard, Grace A. Beard, Union Savings Bank of Modesto, and Stanislaus Land & Abstract Co.; and thereupon, upon consideration thereof, it was ORDERED, ADJUDGED AND DECREED as follows, viz.:

1. That the judgment in that certain action in the Superior Court of the State of California, in and for the County of Stanislaus, Numbered 5344, on the records of that Court, brought by Frederick V. Lineker against Daniel A. McColgan, R. McColgan, Eustace Cullinan, R. S. Marshall and Olive H. Marshall, which judgment was made and entered on the 30th day of April, 1918, is a prior adjudication of the cause of action in this suit and is a bar to the prosecution of this suit;

2. That the bill of complaint herein lacks equity and should be and is hereby dismissed as to all the defendants herein;

3. That the defendants have their costs.

Dated, the 1st day of February, 1924.

FRANK H. RUDKIN,  
United States Circuit Judge.

[Endorsed]: Filed and entered February 1, 1924. Walter B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [26]

(Title of Court and Cause.)

No. 506—IN EQUITY.

OPINION.

JOHN L. TAUGHER, Esq., Attorney for Plaintiffs.

H. M. WRIGHT, Esq., and K. C. PARTRIDGE, Esq., Attorneys for Defendants, R. S. Marshall, Olive H. Marshall, Mary J. Dillon (formerly Mary J. Tynan), E. C. Peck, T. K. Beard, Grace A. Beard, Union Savings Bank of Modesto, and Stanislaus Land and Abstract Co.

A. J. HARWOOD, Esq., Attorney for Defendants, R. McColgan and Adelaide McColgan, Administratrix, etc.

CULLINAN & HICKEY, Esqrs., Attorneys for Defendant, Eustace Cullinan.

MEMORANDUM.

RUDKIN, Circuit Judge.—That complaint in this case commingles matters which have become *res adjudicata* with other matters to such an extent that the Court experienced some difficulty in determining whether the complaint stated an independent cause of action against other defendants, after eliminating all matters determined adversely to the plaintiffs by the State Court.

I still adhere to my former opinion as to the scope and effect of the decision in *Lineker vs. Mc-*

Colgan, and I am still of opinion that the complaint states no independent cause of action against other defendants. Indeed, the whole superstructure of the plaintiffs' case seems to be predicated upon the fraudulent contract of McColgan. The complaint, of course, is susceptible to amendment as to other defendants, but no application for leave to amend has been made and the petition for a rehearing will be denied.

It is so ordered.

[Endorsed]: Filed March 17, 1924. Walter B. Maling, Clerk. [27]

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In the Southern Division of the United States District Court, for the Northern District of California, Second Division.

No. 506—IN EQUITY.

FREDERICK V. LINEKER, and FREDERICK V. LINEKER, as Administrator of the Estate of NORVENA LINEKER, Deceased.

Complainants,

vs.

R. S. MARSHALL, OLIVE H. MARSHALL, MARY J. DILLON (Formerly MARY J. TYNAN), ADELAIDE McCOLGAN, as Administratrix With the Will Annexed of the Estate of DANIEL A. McCOLGAN, Deceased, (Substituted in the Place and Stead of Said DANIEL A. McCOLGAN,



Deceased), R. McCOLGAN, EUSTACE CULLINAN, E. C. PECK, T. K. BEARD, GRACE A. BEARD, UNION SAVINGS BANK OF MODESTO, and STANISLAUS LAND AND ABSTRACT COMPANY,

Defendants.

### STATEMENT ON APPEAL.

This cause came on for trial in the above-entitled court, before the Hon. Frank H. Rudkin, on the 8th day of January, 1924, the complainants herein appearing by John L. Taugher, Esquire, their attorney, the defendants R. S. Marshall, Olive H. Marshall, E. C. Peck, T. K. Beard, Grace A. Beard, Union Savings Bank of Modesto and Stanislaus Land and Abstract Company, appearing by E. C. Partridge, Esquire, their attorney, defendants R. McColgan and Adelaide McColgan, as executrix with the will annexed of the Estate of Daniel A. McColgan, deceased, appearing by A. J. Harwood, Esquire, their attorney, and defendant Eustace Cullinan, appearing by Messrs. Cullinan & Hickey, his attorneys, the following proceedings were had: [28]

Defendants requested leave to file supplemental answer (Defendants' Exhibit "J") setting up that the judgment in the case of Fred V. Lineker, plaintiff, vs. Daniel A. McColgan, and R. McColgan, and Eustace Cullinan and R. S. Marshall and Olive H. Marshall, his wife, defendants, in the Superior Court of the State of California in and for the

County of Stanislaus, which action was numbered 5344 on the files of said Superior Court, and is pleaded in defendants' answer in abatement, as another action pending, had become final since the filing of defendants' respective answers herein, and said supplemental answer pleaded said judgment in said action numbered 5344 in bar and estoppel of this action as a former adjudication of all the issues presented by the amended complaint herein and in said supplemental answer defendants alleged that in said action numbered 5344 said Frederick V. Lineker appeared and acted as the successor in interest of Norvena Lineker and the identical issues of fact and law were involved and litigated and determined between Norvena Lineker and Fred V. Lineker, on the one part, and Daniel A. McColgan, R. McColgan, and Eustace Cullinan, on the other part, that are tendered and involved in this action.

It was stipulated by counsel for plaintiffs that the defendants could proceed and prove anything they could prove if the supplemental answer were filed and counsel for plaintiffs also stipulated and admitted that the judgment in said action numbered 5344 in the Superior Court of Stanislaus County has been affirmed. The Court denied defendants' motion for leave to file the supplemental answer upon the admission and stipulation of plaintiffs' counsel in open court that the same facts might be proved as if pleaded and that defendants could make all the technical proofs necessary to establish their plea of *res adjudicata* with respect

to the judgment in said action numbered 5344.  
[29]

The Court thereupon proceeded to try the two pleas of *res adjudicata* made by the defendants; one based on the final judgment in said action numbered 5344 and the other based on the final judgment in the case of R. S. Marshall and Olive H. Marshall against Daniel A. McColgan and R. McColgan and Eustace Cullinan, as trustees, in the Superior Court of the State of California, in and for the County of Stanislaus, which action was numbered 5353 on the files of said Superior Court and is pleaded as a bar and estoppel in defendants' respective answers. [30]

The defendants offered in evidence a certified copy of the judgment-roll in the action of Lineker vs. McColgan, certified by the Clerk of the Superior Court, in and for the County of Stanislaus. The document was admitted and marked Exhibit "A."

The defendants thereupon offered in evidence a certified copy of *remittitur* from the District Court of Appeal of the Third Appellate District, in the case of Lineker vs. McColgan. This was received in evidence and marked Exhibit "B."

The defendants thereupon offered in evidence a certified copy of the order of the Supreme Court of the State of California, transferring the case of Lineker vs. McColgan, from the Supreme Court to the District Court of Appeal, Third Appellate District, which was received in evidence and marked Exhibit "C."

The defendants thereupon offered in evidence a certified copy of appellant's points and authorities filed in the District Court of Appeal of the State of California, Third Appellate District, in the case of Lineker vs. McColgan. This was received in evidence and marked Defendants' Exhibit "D."

The defendants thereupon offered in evidence a certified copy of bill of exceptions settled and filed in the Superior Court of the State of California, in and for the County of Stanislaus, in the case of Lineker vs. McColgan. This was received in evidence and marked Defendants' Exhibit "E."

#### TESTIMONY OF EUSTACE CULLINAN, FOR DEFENDANTS.

EUSTACE CULLINAN, called as a witness for the defendants, sworn and testified in substance as follows: I was one of the attorneys for the defendants in the case of Fred Lineker against Daniel A. McColgan, Eustace Cullinan and Marshall and his wife, pending in the Superior Court of Stanislaus County, and numbered 5344 in the records of that court. I took part in the trial of the case. These three documents are the briefs that were filed in that case in the trial court, before Judge Langdon. [31]

The three documents were thereupon offered and admitted in evidence and marked Defendants' Exhibits "F," "G," and "H."

"Mr. HARWOOD.—And also in connection with the other defense raised in the answer, the defendants offer in evidence a certified copy of the

judgment-roll in the case of R. S. Marshall and Olive H. Marshall, plaintiffs, vs. Daniel McColgan, R. McColgan and Eustace Cullinan, duly certified by the Clerk of the Court of Stanislaus County. This was also introduced in evidence at the last trial.

Mr. TAUGHER.—I object to that, your Honor, on this ground, that that is a part of their defense. It is pleaded as a special defense. I think if they are permitted to put in their defense before I am permitted to put in my affirmative case, a very heavy burden is imposed upon me.

Mr. HARWOOD.—That is the way a plea of *res adjudicata* is usually tried.

The COURT.—I understood the defense of *res adjudicata* was to be tried separate from the main case.

Mr. TAUGHER.—Not with my consent, your Honor. I object to it being tried at this time. They plead it as a defense. Now, certainly, your Honor cannot—

The COURT.—We have wasted half a day's time if your objection is good. I assumed you were going to try that question first.

Mr. TAUGHER.—I don't want to, your Honor. I contended yesterday I wanted to have your Honor hear the whole evidence in this case before the plea of *res adjudicata* came up. That is the very contention I made from the very start of this case. I am sorry if your Honor misapprehended my contention.

The COURT.—If that question can be determined on the record, I am going to determine it first.

Mr. TAUGHER.—It cannot be determined from the record, because Norvena Lineker was not a party to that action.

The COURT.—That is for the Court to determine.

Mr. TAUGHER.—They plead this judgment as a special defense. That is set up as a third special defense.

The COURT.—It is pleaded in bar, just the same as the judgment we were considering yesterday.

Mr. TAUGHER.—That is a matter that comes up as a defense. Lineker was not a party to that action.

The COURT.—The equity rules expressly provide that a separate defense of this kind may be tried independently of the main action. [32]

Mr. TAUGHER.—I don't question that, your Honor.

The COURT.—That was the course pursued by Judge Van Fleet, and that is the course I am going to pursue.

The COURT.—I will overrule the objection."

To which the complainants did then and there and do now except. (Complainants' Exception No. 1.)

(Testimony of Eustace Cullinan.)

The judgment-roll in the case of Marshall vs. McColgan was thereupon admitted in evidence and marked Defendants' Exhibit "I."

Whereupon defendants rested.

### TESTIMONY OF EUSTACE CULLINAN, FOR COMPLAINANTS.

EUSTACE CULLINAN, recalled as a witness on behalf of complainants, testified: "This is the brief prepared by me and filed by me in the Supreme Court."

The brief in question was thereupon offered and received in evidence and marked Complainants' Exhibit 1."

The WITNESS.—(Continuing.) "There was nothing that the court regarded as enlarging the issues in the case."

Thereupon complainants offered in evidence the oral argument of Mr. A. J. Harwood on behalf of respondents in the District Court of Appeal, in the case of Lineker vs. McColgan, which document was received in evidence and marked Complainants' Exhibit 2.

Thereupon complainants offered in evidence defendants' brief in the Superior Court of the County of Stanislaus, in the case of Lineker vs. McColgan, which document was received in evidence and marked Complainants' Exhibit 3.

Complainants rested.

Defendants thereupon offered in evidence a copy of the proposed supplemental answer of defend-

ants in this action, which document was received in evidence and marked Defendants' Exhibit "J." [33]

No other testimony was offered or received on either side.

Thereupon the case was submitted to the Court for its decision.

The foregoing statement is hereby settled and allowed as and for the appellants' statement on appeal of the evidence taken at the trial of said cause.

Dated: San Francisco, California, October 24th, 1924.

FRANK H. RUDKIN,

Judge.

O. K. as settled.

GLENSOR, CLEWE & VAN DINE,

Attorneys for Complainants.

K. C. PARTRIDGE,

Attorney for R. S. Marshall, Olive H. Marshall, E. C. Peck, T. K. Beard, Grace A. Beard, Union Savings Bank of Modesto and Stanislaus Land and Abstract Company.

A. J. HARWOOD,

Attorney for R. McColgan and Adelaide McColgan, etc.

CULLINAN & HICKEY,

Attorneys for Eustace Cullinan.

[Endorsed]: Filed Oct. 24, 1924. Walter B. Maling, Clerk. By A. C. Aurich, Deputy Clerk.

[34]



In the Southern Division of the United States District Court, for the Northern District of California, Second Division.

No. 506—IN EQUITY.

FREDERICK V. LINEKER and FREDERICK V. LINEKER, as Administrator of the Estate of NORVENA LINEKER, Deceased,  
Plaintiffs,

vs.

R. S. MARSHALL, OLIVE H. MARSHALL, MARY J. DILLON (Formerly MARY J. TYNAN), ADELAIDE McCOLGAN, as Administratrix With the Will Annexed of the Estate of DANIEL A. McCOLGAN, Deceased (Substituted in Place and Stead of Said DANIEL A. McCOLGAN, Deceased), R. McCOLGAN, EUSTACE CULLINAN, E. C. PECK, T. K. BEARD, GRACE A. BEARD, UNION SAVINGS BANK OF MODESTO, and STANISLAUS LAND AND ABSTRACT COMPANY,  
Defendants.

### ASSIGNMENT OF ERRORS.

Now comes the above-named plaintiffs, Frederick V. Lineker, individually, and Frederick V. Lineker, as administrator of the estate of Norvena A. Lineker, deceased, and file with their petition for an appeal from the judgment and decree made and entered in the above-entitled court and cause on the

1st day of February, 1924, sustaining the plea of *res adjudicata* and dismissing the bill of complaint herein, the following assignment of errors, and specify that said order, judgment and decree was and is erroneous in this:

I.

The Court erred in holding that the judgment in that certain action in the Superior Court of the State of California, in and for the County of Stanislaus, and therein numbered 5344 on [35] the records of said court wherein Fred V. Lineker was plaintiff and Daniel A. McColgan, R. McColgan, Eustace Cullinan, R. S. Marshall and Olive H. Marshall, his wife, were defendants, was or is a bar to the prosecution of this action.

II.

The Court erred in holding that the bill of complaint herein lacks equity.

III.

The Court erred in holding that the bill of complaint herein should be dismissed.

IV.

The Court erred in entering its judgment and decree dismissing the said bill of complaint.

WHEREFORE, the appellants pray that said decree be reversed and that said District Court for the Northern District of California, Southern Division, be ordered to enter a decree reversing the decision of the lower court in said cause.

Dated: July 22d, 1924.

JOHN L. TAUGHER,  
GLENSOR, CLEWE & VAN DINE,  
Solicitors for Complainants and Appellants.

[Endorsed]: Filed Jul. 23, 1924. Walter B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk.  
[36]

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In the Southern Division of the United States District Court, for the Northern District of California, Second Division.

No. 506—IN EQUITY.

FREDERICK V. LINEKER and FREDERICK  
V. LINEKER, as Administrator of the Estate of NORVENA LINEKER, Deceased,  
Plaintiffs,

vs.

R. S. MARSHALL, OLIVE H. MARSHALL,  
MARY J. DILLON (Formerly MARY J. TYNAN), ADELAIDE McCOLGAN, as Administratrix With the Will Annexed of the Estate of DANIEL A. McCOLGAN, Deceased (Substituted in Place and Stead of Said DANIEL A. McCOLGAN, Deceased), R. McCOLGAN, EUSTACE CULLINAN, E. C. PECK, T. K. BEARD, GRACE A. BEARD, UNION SAVINGS BANK OF MODESTO, and STANISLAUS LAND AND ABSTRACT COMPANY,

Defendants.

## PETITION FOR ORDER ALLOWING APPEAL.

The above-named plaintiffs feeling aggrieved by the decree rendered and entered in the above-entitled cause on the 24th day of January, A. D. 1924, does hereby appeal from the said decree to the Circuit Court of Appeals for the Ninth Circuit, for the reasons set forth in assignment of errors filed herewith, and they pray that their appeal be allowed and that citation be issued as provided by law, and that a transcript of the records, proceedings and document upon which said decree was based, duly authenticated, be sent to the United States Circuit Court of Appeals for the Ninth Circuit, under the rules of such court in such cases made and provided.

And your petitioners further pray that the proper order [37] relating to the required security required by him be made.

Dated: July 22d, 1924.

JOHN L. TAUGHER,  
GLENSOR, CLEWE & VAN DINE,  
Solicitors for Said Plaintiffs.

## ORDER ALLOWING APPEAL.

The foregoing petition for appeal is hereby allowed.

Dated: July 23d, 1924.

HUNT,  
United States Circuit Judge.

[Endorsed]: Filed July 23, 1924. Walter B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk.

In the Southern Division of the United States District Court for the Northern District of California, Second Division.

No. 506—IN EQUITY.

FREDERICK V. LINEKER and FREDERICK V. LINEKER, as Administrator of the Estate of NORVENA LINEKER, Deceased,  
Plaintiffs,

vs.

R. S. MARSHALL, OLIVE H. MARSHALL, MARY J. DILLON (Formerly MARY J. TYNAN), ADELAIDE McCOLGAN, as Administratrix With the Will Annexed of the Estate of Daniel A. McCOLGAN, Deceased, (Substituted in Place and Stead of Said DANIEL A. McCOLGAN, Deceased), R. McCOLGAN, EUSTACE CULLINAN, E. C. PECK, T. K. BEARD, GRACE A. BEARD, UNION SAVINGS BANK OF MODESTO, and STANISLAUS LAND AND ABSTRACT COMPANY,  
Defendants.

BOND ON APPEAL.

KNOW ALL MEN BY THESE PRESENTS: That we, Frederick V. Lineker and Frederick V. Lineker, as administrator of the Estate of Norvena Lineker, deceased, as principals, and United States Fidelity & Guaranty Co., a corporation, organized

and existing under and by virtue of the laws of the State of Maryland, and engaged in business in the said State of California pursuant to the laws thereof, as surety, are held and firmly bound unto the defendants above named in the sum of Five Hundred (500) Dollars, lawful money of the United States of America, to be paid to the said defendants, their heirs, executors, successors, administrators or assigns, for which payment well and truly to be made, we bind ourselves, our heirs, administrators, successors and assigns, jointly and [39] severally, firmly by these presents.

IN WITNESS WHEREOF, the said principals have hereunto set their hands and seals, and the said surety has caused its corporate name and seal to be hereunto affixed, this 21st day of July, 1924.

The condition of the above obligation is such that whereas on the 24th day of January, 1924, a final decree was rendered, made and entered in the above-entitled cause in the Southern Division of the United States District Court, for the Northern District of California, Second Division, sustaining the plea of *res judicata* and decreeing that the bill of complaint in the above-entitled action be dismissed, and the said plaintiffs last named having obtained an order allowing an appeal from said final decree, and a citation directed to said defendants, citing and admonishing them to be and appear at a session of the United States Circuit Court of Appeals for the Ninth Circuit to be holden at the City of San Francisco, in said Circuit, on the 21st day of August next.

NOW, THEREFORE, if the said plaintiffs shall prosecute said appeal to effect and answer all damages and costs if they fail to make their plea good, then the above obligation to be void; otherwise to remain in full force, virtue and effect.

(Premium charged for this bond is \$10.00 per annum.)

FREDERICK V. LINEKER,

FREDERICK V. LINEKER,

As Administrator of the Estate of Norvena Lineker,  
Deceased.

UNITED STATES FIDELITY & GUAR-  
ANTY CO.

[Seal] By HENRY V. D. JOHNS,  
Attorney-in-fact.

Approved July 22, 1924.

HUNT,  
U. S. Circuit Judge.

[Endorsed]: Filed July 23, 1924. Walter B.  
Maling, Clerk. By J. A. Schaertzer, Deputy Clerk.

[40]

In the Southern Division of the United States District Court, for the Northern District of California, Second Division.

No. 506—EQUITY.

FREDERICK V. LINEKER and FREDERICK  
V. LINEKER, as Administrators of the Es-  
tate of NORVENA LINEKER, Deceased,  
Complainants,

vs.

R. S. MARSHALL et al.,

Defendants.

PRAECIPE FOR TRANSCRIPT OF RECORD  
ON APPEAL.

To the Clerk of the Above-entitled Court:

Sir: Please prepare transcript on appeal to the Circuit Court of Appeals for the Ninth Circuit and incorporate therein the following portions of the record:

1. Order *re* printing of record and transmission of original exhibits.
2. Answer of R. S. Marshall, Olive H. Marshall, E. C. Peck, T. K. Beard, Grace A. Beard, Union Savings Bank of Modesto and Stanislaus Land and Abstract Company to amended bill of complaint.
3. Memorandum opinion of Rudkin, J., filed January 24th, 1924.
4. Final decree of February 1st, 1924.
5. Petition for appeal.
6. Order allowing appeal.



7. Assignment of errors.
8. Bond on appeal. [41]
9. Citation on appeal, and proof of service thereof.
10. Statement on appeal.
11. Disclaimer of Daniel A. McColgan, R. McColgan and Eustace Cullinan.
12. Disclaimer of Mary J. Dillon, formerly Mary J. Tynan, and E. C. Peck.
13. Order substituting Frederick V. Lineker as administrator, in the place and stead of Norvena Lineker.

14. This praecipe.

Dated: October 15th, 1924.

JOHN L. TAUGHER,  
GLENSOR, CLEWE & VAN DINE,  
Solicitors for Complainants.

Due service and receipt of a copy of the within praecipe for record on appeal is hereby admitted this 15th day of October, 1924.

Served on Alfred J. Harwood Oct. 17, 1924.

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Attorney for Adelaide McColgan, etc., and R. McColgan.

H. M. WRIGHT,  
K. C. PARTRIDGE,

Attorneys for R. S. Marshall, Olive H. Marshall, E. C. Peck, T. K. Beard, Grace A. Beard, Union Savings Bank of Modesto and Stanislaus Land and Abstract Company.

CULLINAN & HICKEY,  
Attorneys for Eustace Cullinan.

Rec'd copy October 16th, 1924.

[Endorsed]: Filed Oct. 17, 1924. Walter B. Maling, Clerk. By A. C. Aurich, Deputy Clerk.  
[42]

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In the Southern Division of the United States  
District Court for the Northern District of  
California, Second Division.

No. 506—EQUITY.

FREDERICK V. LINEKER and FREDERICK  
V. LINEKER, as Administrator of the  
Estate of NORVENA LINEKER, Deceased,  
Complainants,

vs.

R. S. MARSHALL et al.,

Defendants.

PRAECIPE FOR ADDITIONAL PORTIONS  
OF RECORD WHICH APPELLEES DE-  
SIRE INCORPORATED IN TRANSCRIPT  
ON APPEAL.

To the Clerk of the Above-entitled Court:

Dear Sir: Please incorporate in the transcript on complainants' appeal herein the following additional portions of the record, viz.:

1. Original bill of complaint filed June 6, 1918.
2. Order dated November 7, 1921, substituting Adelaide McColgan, as administratrix in place and stead of Daniel A. McColgan, deceased.
3. Memorandum opinion of Judge Rudkin filed March 17, 1924.

Dated, October 24, 1924.

K. C. PARTRIDGE,

Attorney for Defendants R. S. Marshall, Olive H. Marshall, E. C. Peck, T. K. Beard, Grace A. Beard, Union Savings Bank of Modesto, Stanislaus Land and Abstract Company.

A. J. HARWOOD,

Attorney for Defendants R. McColgan and Adelaide McColgan, as Administratrix With the Will Annexed of the Estate of Daniel A. McColgan, Deceased (Substituted in the Place and Stead of Said Daniel A. McColgan, Deceased).

CULLINAN & HICKEY,

Per. A. J. H.

Attorneys for Defendant Eustace Cullinan.

Service and receipt of copy of foregoing praecipe is hereby admitted this 24th day of October, 1924.

J. L. TAUGHER,

GLENSOR, CLEWE & VAN DINE,

Attorneys for Complainants.

[Endorsed]: Filed Oct. 24, 1924. Walter B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk.

[43]

In the Southern Division of the United States  
District Court, for the Northern District of  
California, Second Division.

No. 506—EQUITY.

FREDERICK V. LINEKER and FREDERICK  
V. LINEKER, as Administrator of the  
Estate of NORVENA LINEKER, Deceased,  
Complainants,

vs.

R. S. MARSHALL et al.,

Defendants.

STIPULATION IN RE SETTLEMENT OF  
PRAECIPES.

It is hereby stipulated and agreed by and between  
the parties hereto that the following items of ap-  
pellants and appellees respective praecipes may be  
omitted from the certified copy of the record sent  
up to the Circuit Court of Appeals for the Ninth  
Circuit, to wit:

Item No. 11 of appellants' praecipie, being a dis-  
claimer of Daniel A. McColgan, R. McColgan and  
Eustace Cullinan;

Item No. 12 of appellants' praecipie, being a dis-  
claimer of Mary J. Dillon, formerly Mary J.  
Fynan, and E. C. Peck;

Item No. 1 of appellees praecipie, being the origi-  
nal bill of complaint filed in the above-entitled  
cause.

Dated: October 31, 1924.

JOHN L. TAUGHER,  
GLENSOR, CLEWE & VAN DINE,  
Solicitors for Appellants.

ALFRED J. HARWOOD,  
Solicitors for Appellees Adelaide McColgan, Ex-  
ecutrix, etc., and R McColgan.

H. M. WRIGHT,  
K. C. PARTRIDGE,  
Solicitors for Appellees R. S. Marshall et al.  
CULLINAN & HICKEY,  
Solicitors for Eustace Cullinan.

It is so ordered.

PARTRIDGE, J.

[Endorsed]: Filed Nov. 1, 1924. Walter B.  
Maling, Clerk. By A. C. Aurich, Deputy Clerk.

[44]

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In the Southern Division of the United States  
District Court, for the Northern District of  
California, Second Division.

No. 506—EQUITY.

FREDERICK V. LINEKER and FREDERICK  
V. LINEKER, as Administrator of the  
Estate of NORVENA LINEKER, Deceased,  
Complainants,

vs.

R. S. MARSHALL, et al.,

Defendants.

ORDER RE PRINTING OF RECORD AND  
TRANSMISSION OF ORIGINAL EX-  
HIBITS.

Upon affidavit of H. W. Glensor, one of the attorneys for the complainants herein, and good cause appearing therefor, it is hereby ordered that the amended bill of complaint and exhibits and the answer of D. A. McColgan, R. McColgan and Eustace Cullinan, and exhibits, printed, filed and docketed in the United States Circuit Court of Appeals for the Ninth Circuit, on the former appeal in the above-entitled action, numbered 3964 in the records of said court, appearing on pages 2 to 139, inclusive, of the transcript of record on file therein, need not be certified to, printed or docketed on this appeal but may be referred to and used on this appeal with the same force and effect as if the same were printed in the transcript of record on this appeal.

Upon like affidavit and good cause appearing therefor it is hereby ordered that all of the original exhibits introduced in evidence upon the trial of the above-mentioned cause in the said Circuit Court of Appeals for the Ninth Circuit may be sent up in connection with the appeal prosecuted herein as original [45] exhibits to the Circuit Court of Appeals for the Ninth Circuit, instead of being copied into the record on appeal.

Dated: San Francisco, California, October 13, 1924.

HUNT,  
Judge.



In the Southern Division of the United States District Court, for the Northern District of California, Second Division.

No. 506—IN EQUITY.

FREDERICK V. LINEKER and FREDERICK V. LINEKER, as Administrator of the Estate of NORVENA LINEKER, Deceased.  
Plaintiffs,

vs.

R. S. MARSHALL, OLIVE H. MARSHALL, MARY J. DILLON (Formerly MARY J. TYNAN), ADELAIDE McCOLGAN, as Administratrix With the Will Annexed of the Estate of DANIEL A. McCOLGAN, Deceased (Substituted in Place and Stead of Said DANIEL A. McCOLGAN, Deceased), R. McCOLGAN, EUSTACE CULLINAN, E. C. PECK, T. K. BEARD, GRACE A. BEARD, UNION SAVINGS BANK OF MODESTO and STANISLAUS LAND AND ABSTRACT COMPANY,  
Defendants.

#### CITATION ON APPEAL.

United States of America,—ss.

The President of the United States, to Frederick V. Lineker and Frederick V. Lineker, as Administrator of the Estate of Norvena Lineker, Deceased, the Plaintiffs in a Suit Pending in



the Southern Division of the United States District Court for the Northern District of California, Second Division (Numbered 506 in Equity on the Records of Said Court), and to R. S. Marshall, Olive H. Marshall, Mary J. Dillon (Formerly Mary J. Tynan), Adelaide McColgan, as Administratrix With the Will Annexed of the Estate of Daniel A. McColgan, Deceased (Substituted in Place and Stead of Said Daniel A. McColgan, Deceased), R. McColgan, Eustace Cullinan, E. C. Peck, T. K. Beard, Grace A. Beard, Union Savings Bank of Modesto, and Stanislaus Land and Abstract Company, Defendants in [48] Said Suit, GREETING:

You are hereby cited and admonished to be and appear at a United States Circuit Court of Appeals for the Ninth Circuit to be held at the City of San Francisco, State of California, within thirty days from the date hereof, to wit, on the 22d day of August, 1924, pursuant to an order allowing an appeal, filed and entered in the Clerk's Office of the United States District Court for the Southern Division of the Northern District of California (Second Division), from a final decree signed, filed and entered on the 24th day of January, A. D. 1924, in that certain suit, being in Equity number 506, wherein Frederick V. Lineker, individually, and Frederick V. Lineker, as administrator of the Estate of Norvena A. Lineker, deceased, are plaintiffs, and you are defendants and appellees, to show cause, if any there be, why the decree ren-

dered against the said appellants, as in said order allowing appeal mentioned, should not be corrected and why justice should not be done to the parties in that behalf.

WITNESS, the Honorable WM. H. HUNT, United States Circuit Judge for the Ninth Circuit, this 23d day of July, 1924, and of the Independence of the United States, the 148th.

HUNT,

United States Circuit Judge. [49]

Receipt of a copy of the within citation on appeal is hereby admitted this 23d day of July, 1924.

ALFRED J. HARWOOD,

Solicitors for Appellees, Adelaide McColgan, as Admr., and R. McColgan.

H. M. WRIGHT,

K. C. PARTRIDGE,

Solicitors for Appellees R. S. Marshall, Olive H. Marshall, Mary J. Dillon, E. C. Peck, T. K. Beard, Union Savings Bank of Modesto and Stanislaus Land and Abstract Company.

CULLINAN & HICKEY,

Solicitors for Appellee, Eustace Cullinan.

[Endorsed]: No. 506. In the Southern Division of the United States District Court for the Northern District of California, Second Division. Equity. Frederick V. Lineker et al., Plaintiffs, vs. R. S. Marshall et al., Defendants. Citation on Appeal. Filed July 28, 1924. Walter B. Maling, Clerk.

[Endorsed]: No. 4414. United States Circuit Court of Appeals for the Ninth Circuit. Frederick V. Lineker and Frederick V. Lineker as Administrator of the Estate of Norvena Lineker, Deceased, Appellant, vs. R. S. Marshall, Olive H. Marshall, Mary J. Dillon (Formerly Mary J. Tynan), Adelaide McColgan, as Administratrix With the Will Annexed of the Estate of Daniel A. McColgan, Deceased (Substituted in Place and Stead of Said Daniel A. McColgan, Deceased), R. McColgan, Eustace Cullinan, E. C. Peck, T. K. Beard, Grace A. Beard, Union Savings Bank of Modesto and Stanislaus Land and Abstract Company, Appellees. Transcript of Record. Upon Appeal from the Southern Division of the United States District Court for the Northern District of California, Second Division.

Received November 19, 1924.

F. D. MONCKTON,  
Clerk.

Filed December 2, 1924.

F. D. MONCKTON,  
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

By Paul P. O'Brien,  
Deputy Clerk.

